

California Fair Political Practices Commission

Conflict-of-Interest Codes - Designating Positions

Introduction

The FPPC is frequently asked why an agency cannot require all of its employees to file a Form 700, Statement of Economic Interests. The following discussion outlines the statutory¹ and regulatory requirements that provide the basis for determining which positions should be designated.

Discussion

One of the most frequent questions to FPPC staff is how does an agency determine which positions should be included in a conflict-of-interest code. The answer is that each agency is unique, and the list of positions is dependent upon several factors. For example, an analyst in one agency may not even be covered in a conflict-of-interest code because that position has no purchasing authority, and its regulatory related duties are substantially reviewed by more than one supervisor and director. In another agency, the analyst may have full authority with little oversight. The following discussion provides background on the statutes, regulations, and guidance provided through advice letters.

The Political Reform Act ("Act") requires that "every agency shall adopt and promulgate a conflict-of-interest code." (Section 87300.) Section 87302(a) provides that a conflict-of-interest code shall contain "specific enumeration of the positions within the agency which involve the making or participation in the making of decisions which may foreseeably have a material financial effect on any financial interest." The term "public official" is defined, in part, in Section 82048 as ". . . every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government." With respect to each such position, a code is required to list the specific types of investments, interests in real property, and income that must be disclosed. The responsibility for determining if a code meets these specifications rests with the "code reviewing body." (Section 87303.)

Section 87309 states what a conflict-of-interest code must contain before it may be approved by the code reviewing body. Paragraph (c) of that section provides that a code may not be approved if it "fails to adequately differentiate between designated employees with different powers and responsibilities." This provision is intended to ensure, first, that a conflict-of-interest code requires financial disclosure only from employees required to be designated by Section 87302(a) and, second, that a code

¹ All statutory references are to the Government Code unless otherwise noted.

relate disclosure to the specific duties of such designated employees. Thus, a code reviewing body would fail to fulfill its obligation under Section 87309(c) if it allowed designation of positions in a code which, to quote the language of Section 87302(a), do not entail the “making or participation in the making” of governmental decisions. It would be equally improper for a code reviewing body to require disclosure of interests that may not foreseeably be affected materially by decisions made or participated in by designated employees.

In *City of Carmel-by-the-Sea v. Young*, the Supreme Court held, in general, that there must be a balancing of interests between the government’s need to expose or minimize possible conflicts of interest on the one hand, and the right to maintain privacy in one’s personal financial affairs while seeking or holding public office on the other. (2 Cal.3d 259 (1970).) Required disclosure of economic interests under the Act has been found to be appropriate where it is narrowly tailored to avoid unwarranted intrusion into the privacy of the public officials involved. (See, *Hays v. Wood*, 25 Cal.3d 770 (1979).)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) Therefore, such positions should be designated in the agency’s conflict-of-interest code.

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) If a superior relies on an individual’s professional judgment, then the individual is participating in making a governmental decision. In other words, if the individual influences the final decision by supporting a position or suggesting a course of action, he/she is participating in the decision even if he/she is not making the final decision. Therefore, the individual’s position must be designated in the conflict-of-interest code.

There are several techniques to assist in making the determination of which positions need to be designated in the code. These include reviewing organizational charts – generally, the positions closest to the top must be designated in the code. The larger the agency, the more likely it is that lower level positions have narrower duties and additional, substantive review, and therefore, do not need to be designated. Meeting minutes and annual reports also provide information on the position responsibilities and provide insight as to which positions warrant supplementary review. Additionally, agency websites (such as the contact us page) may provide clues as to whether all positions on an organizational chart are up to date. And lastly, current job duty statements should be requested.

Summary

High level positions that have authority to vote on a matter, appoint a person, obligate or commit his or her agency to a course of action, or enter into any contractual agreement on behalf of his or her agency, mid-level positions that have authority to negotiate decisions on behalf of the agency without significant substantive review, and positions that advise or make recommendations to the decision-maker by conducting research or an investigation, preparing or presenting a report, analysis or opinion that requires the exercise of judgment on the part of the employee and the employee is attempting to influence the decision, should all be designated in the conflict-of-interest code. Positions that are strictly manual, clerical, or ministerial in nature should not be designated in the conflict-of-interest code. It is important to note that an express purpose of the Act is to ensure that the assets and income of public officials be disclosed so that conflicts of interests may be avoided. However, as discussed in the foregoing paragraphs, only those positions that make or participate in making governmental decisions are required to report assets and income on a public form. Thus, the agency and code reviewing body must take a careful look at the agency's governmental programs and functions as well as the specific duties of those positions being designated in the code.